No.80-195

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

METROMEDIA, Inc., *et al.*,
Appellants,

v.

CITY OF SAN DIEGO, *et al.*

On Appeal From The Supreme Court of California

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

John Dekker, Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

Roy D. Bates, City Attorney
P.O. Box 147
Columbia, South Carolina 29217

James B. Brennan, City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

Aaron A. Wilson, City Attorney
28th Floor - City Hall
Kansas City, Missouri 64106

Henry W. Underhill, Jr.,
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

J. LaMar Shelley, City Attorney
48 North Macdonald Street
Mesa, Arizona 85201

William R. Quinlan, Corporation
Counsel
511 City Hall
Chicago, Illinois 60602

Benjamin L. Brown, City Solicitor
101 City Hall
100 N. Holiday Street
Baltimore, Maryland 21202

(Attorneys continued on inside front cover)

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

George F. Knox, Jr., City Attorney
174 E. Flagler Street
Miami, Florida 33131

Max P. Zall, City Attorney
City & County Building
Denver, Colorado 80202

Allen G. Schwartz
Corporation Counsel
100 Church Street, Room 6A-11
New York, New York 10007

Lee E. Holt, City Attorney
Dallas City Hall, 1500 Marilla
Room 7BN
Dallas, Texas 75201

Burt Pines, City Attorney
1800 City Hall East
Los Angeles, California 90012

Walter M. Powell,
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Roger F. Cutler, City Attorney
101 City & County Building
Salt Lake City, Utah 84111

Jeffrey S. Goddess, City Solicitor
City-County Building, 9th Floor
800 French Street
Wilmington, Delaware 19801

Conard B. Mattox, Jr.
City Attorney
300 City Hall
Richmond, Virginia 23219

Charles S. Rhyne
William S. Rhyne
1000 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420
Counsel of Record

Attorneys for Amicus Curiae
National Institute of Municipal
Law Officers

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 36 of this Court, the National Institute of Municipal Law Officers (NIMLO) respectfully submits this brief as amicus curiae in support of appellee, City of San Diego. NIMLO is an organization composed entirely of municipalities, which are political subdivisions of states. Founded in 1935, it now has a membership of over 1500 municipalities located in all 50 states and the District of Columbia. Each member municipality participates through its chief legal officer, usually designated as city attorney, corporation counsel, city counselor, etc., and the chief legal officer's assistants.

As the chief legal officers of their cities, those who operate NIMLO for their municipalities are responsible for the enforcement of billboard regulation measures, such as the San Diego ordinance before this Court. The assertion of the appellants in this case is essentially that cities cannot regulate billboards, either to prevent traffic hazards, or for aesthetic purposes. Such a holding would leave cities unable to serve the needs of their citizens and visitors.

NIMLO believes that the opinion of the Supreme Court of California here on appeal properly balances the interests of the appellee billboard proprietors and their customers, on the one hand, and local governments and their citizens, on the other. NIMLO therefore offers its views in support of the affirmance of that judgment.

Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

A. San Diego's ordinance banning billboards throughout the city is a reasonable exercise of the police power to combat a serious problem of traffic safety and to promote the combination of aesthetic betterment for its own sake and the preservation of public and private property values which accompanies aesthetic betterment. San Diego's explicit and detailed Planning Commission report on the problem and need mirrors the concerns of other cities, and of the Congress, in banning billboards. All of this evidence supports the remedy chosen by the San Diego City Council in the challenged ordinance.

B. Far from ignoring the First Amendment issue, as appellants contend, the California Supreme Court carefully

balanced the governmental and commercial speech interests involved in this case. Indeed, one of the examples of noncommercial speech relied on by appellants was given primacy by the California Court, and by this Court last Term, in *Prune Yard Shopping Center* v. *Robins,* 447 U.S. ____, 100 S. Ct. 2035 (1980). It is thus clear that the courts will protect both commercial and noncommercial speech by considering both the speech and the dangers of the medium in which it is expressed. That is precisely what the Supreme Court of California has done in this case, and the judgment should be affirmed.

ARGUMENT

It is important at the outset to make clear what is, and what is not, involved in this case.

Appellants are the proprietors of 500 to 800 advertising billboards within the City of San Diego, Joint Stipulation ¶13, J.S. App. 122a, which they value "as a part of an income-producing system," *id.*, ¶18, J.S. App. 123a. The appellants challenge the facial validity of a 1972 ordinance prohibiting the erection of billboards and requiring, over a variable amortization period, the removal of existing billboards.

The judgment here for review necessarily did not consider whether the absence of billboards would inhibit any particular communication. J.S. App. 23a, n.14. The California Supreme Court thus did not find it necessary to evaluate the relative economy and efficiency of other advertising media.[1] On the other hand, the California Court did conclude that billboards pose a hazard, and

[1]In any event, appellants have described their medium as ideologically indifferent, "made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising." Joint Stipulation ¶ 22, J.S. App. 123a.

were regulable under a government power (zoning) not similarly applicable to other advertising media such as leaflets, soundtrucks and newspapers.[2]

To overcome the defects of their medium, the appellant billboard proprietors assert in both of their Questions Presented that the Constitution bars the City of San Diego, or any other city, from prohibiting billboards in furtherance of the cities' goals of reducing traffic hazards and improving the aesthetic qualities of their environs. Appellants argue, as they must to support reversal, that billboards are a constitutionally essential medium for advertising.[3]

In their first Question particularly, the appellants ask this Court to declare billboards a "distinct" and "valuable" medium of advertising. Apparently, the appellants hope the policy judgment of this Court will be more hospitable to billboards than were those in city councils throughout the nation. That hope, however, is at odds with the proper role of the courts in reviewing legislation.[4]

The appellants then argue from their second Question Presented, that there exists an insufficient connection between a prohibition of billboards and the legitimate government purposes of safety and aesthetic preservation.[5]

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[2]J.S. App. 24a. "[A] billboard is a large, immobile, and permanent structure. . . ." *Ibid.*

[3]Br. 22, 24-25.

[4]Certainly, appellants' description of San Diego as a city of beaches, parks, a seaport, hundreds of miles of streets, highways and freeways, a large industrial area, J.S. 3-4, suggests the practical impossibility of this Court's amending the zoning code of each city which has banned billboards. Each such ban represents a particularized legislative assessment of the peculiarly local characteristics appellants have enumerated. We offer examples of these localized assessments, *infra*.

[5]Thus, we address most particularly appellants' brief, pp. 41-45.

SAN DIEGO'S ORDINANCE PROPERLY ADDRESSED THE TRAFFIC HAZARDS AND AESTHETIC BLIGHT BILLBOARDS CAUSE CITYWIDE.

We begin with the proposition that this Court has committed itself to uphold legislation where there are "plausible reasons,"[6] or "a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature."[7]

Both the actual purpose of the San Diego billboard ordinance and the presumed purpose, gleaned from similar legislative acts by the Congress and in other states, fully show that "the adverse impact [on the billboard proprietors here] may reasonably be viewed as an acceptable cost of achieving a larger goal,"[8] namely the twin goals of traffic safety and environmental betterment.[9]

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[6] *United States Railroad Retirement Board* v. *Fritz*, No. 79-870, slip op. at 11 (Dec. 9, 1980).

[7] *Id.* Stevens, J., concurring, slip op., at 2.

The judicial presumption of a legitimate purpose or means is quite different from the "presumption of validity" which appellants attack, Br. 41, n.**. The misuse of the latter presumption is an abdication of judicial review. But the former presumption merely (in this case) imputes to a particular city council what is common knowledge among common councils and common citizens nationwide, that billboards are distracting (if they are used enough to be profitable) and unsightly. Indeed, these propositions were the subject of judicial notice at trial in this case R. (Clerk's Tr.) 767. The trial court made no findings contrary to the proffered facts noticeable. J.S. App. 95a-97a.

In this regard, the office of our brief is to confirm the obvious: that cities nationwide have reached the same conclusion respecting billboards as did San Diego.

[8] *Ibid.*

[9] Thus, neither we nor the City appellee are limited to the citation of precedent such as *Suffolk Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978), to support affirmance. *(Footnote continued on next page).*

A. The City's Expressed Purposes Are Congruent With Findings by Other Cities and by the Congress.

1. One purpose of San Diego's ordinance was "to eliminate excessive and confusing sign displays [and] to eliminate hazards to pedestrians and motorists brought about by distracting sign displays. . . ." San Diego Mun. Code § 101.0700, at A (reprinted, J.S. App. 106a).

San Diego chose a clear rule to accomplish this "proper objective[ ] for the exercise of the city's police power,"[10] namely, to permit most on-premises signs and to forbid off-premises advertising signs.[11] The rule is applied uniformly throughout the city.[12]

(Footnote continued)

Even if this Court regarded the constitutionality of billboard bans as being presented on a clear slate, the judgment of the California Court below should be affirmed.

[10]The quotation is from the opinion of the California Supreme Court, J.S. App. 7a.

[11]The off-premises signs permitted under the ordinance, such as subdivision directional signs and bench signs, are clearly different from advertising billboards in their potential hazard to pedestrians and motorists.

[12]Apparently, appellants would argue that an ordinance consigning their billboards to only the industrial and commercial areas of San Diego would render their business as useless as does the citywide billboard ban. Appellants assert, Br. 6-7, that billboard advertising is most effective on a saturation basis throughout all parts of a metropolitan area.

Since the appellants would use the entire city area for saturation billboard advertising, there is no possibility "the governmental interest could be served as well by a more limited restriction on commercial speech," *Central Hudson Gas & Elec. Co.* v. *Public Serv. Comm'n*, 448 U.S. ____, ____, 100 S.Ct. 2343, 2350 (1980), than a citywide billboard ban. Thus, the appellants' argument that a less-intrusive regulation was available to the City, Br. 28-30, is disingenuous.

All of appellants' billboards are in the commercial and industrial areas of San Diego,[13] a highly concentrated part of the city.[14] They are designed to, and do, attract the attention of motorists.[15] Therefore, appellants' billboards present the most dangerous possibility of billboard hazard. Clearly, some city regulation was compelled

San Diego addressed the billboard problem within the context of the universe of signs, including roof top, identification, projecting, and freestanding signs, and pennants. Its Planning Commission prepared a March 1971 report to the City Council: Summary Report-City Wide Sign Study.[16] The study focused on the traffic hazard created by "signs attempt[ing] to flag down motorists travelling on high speed and/or heavily congested roadways."[17] Photographs were included, among them one of a commercial strip containing so many signs that the report concluded: "businesses not only attempt to outshout their neighbors, they frequently appear to be outshouting themselves."[18]

The Planning Commission considered the experience of 264 California cities[19] in concluding that "the case against

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[13]Joint Stipulation ¶ 20, J.S.App. 123a.

[14]The commercial and industrial zones include only 2.8% of the city area. Joint Stipulation ¶ 9, J.S. App. 121a; Brief of Appellants, at 5. Yet, 22.4% of city citizens work in manufacturing, and 17.5% work in retail trade. Joint Stipulation ¶ 10, J.S.App. 121a.

[15]R. (Clerk's Tr.) 145, 488.

[16]The report, and covering memorandum, were attached to appellants' summary judgment papers, R. (Clerk's Tr.) 703.

[17]R.706.

[18]R.707.

[19]R.708.

[billboards] has been building for many years."[20] The Commission concluded that billboards, as well as rooftop, large projecting, and freestanding signs should be banned citywide.[21]

This determination by the City of San Diego – which underlies the ordinance challenged in this case – is congruent with determinations made both earlier and later by other cities, and by the Congress.

For example, by 1974, 104 Vermont cities had enacted ordinances controlling billboards.[22] A February 15, 1977, ordinance of Germantown, Tennessee[23] recited that "signs have had to become more aggressive, more numerous, more obtrusive in order to maintain the same level of attention." Among the purposes of Naperville, Illinois,' 1974 ordinance[24] was "[t]o protect the public investment in streets and highways by reducing distractions that may increase traffic accidents."

Dallas, Texas, "determined that the proliferation of non-premise signs oriented to be visible from the high-speed freeways and expressways surrounding the central business district distracts the attention of motorists and unnecessarily complicates the decision making required of motorists on the freeways. . . ."[25]

The Congress, in enacting Title 23 of the United States Code in Pub.L.No. 85-767, declared in § 131(a) that national policy forbade billboards near interstate highways.

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[20] *Ibid.*

[21] R.716.

[22] Council of State Governments, Innovations: Vermont's New Signs of the Times, at 1 (1979).

[23] Ord. No. 1976-5, amending City Code § 4-601 et seq.

[24] Ord. No. 74-23, amending Municipal Code § 10.1301 et seq.

[25] Ord. No. 14649 (1974), amending City Code § 41-36 et seq.

In 1965,[26] 23 U.S.C. § 131(a) was amended to its present form, expressing the finding that "the erection and maintenance of outdoor advertising signs. . . should be controlled in order. . .to promote the safety. . .of public travel, and to preserve natural beauty."

In explaining how § 131 would be administered,[27] the Secretary of Commerce referred to "unchecked proliferation which . . . results in a public eyesore," and promised to adapt a complex mechanism of federal-state agreements on billboard spacing and lighting to "new and ingenious types of signs . . . in the future which may or may not present a hazard."[28] Spacing, particularly, was necessary "to prevent a conglomeration of highway signs in the vicinity of an intersection of [sic] interchange which might involve a traffic hazard."[29]

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[26]Pub.L.No. 89-285, § 101, 79 Stat. 1028.

[27]The specific point to be administered was the application of a provision, § 131(d), permitting billboards in commercial and industrial zones, to unzoned land. H.R.Rep.No. 1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Adm. News, at 3713.

[28]H.R.Rep.No.1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Adm. News 3710, 3714.

[29]*Ibid.* Congress certainly was entitled to insist on a more complicated, and more costly, form of billboard regulation for highway fringes than San Diego has chosen for its own exclusive area. And, the federal view was given primacy in its own proper area in this case. J.S.App. 26a. This does nothing to detract from three propositions, however. First, even Congress saw no need (or no possibility) of the kind of billboard-by-billboard factfinding appellants suggest, Br. 42, in order to ban their 800 San Diego billboards. Second, appellants no doubt would argue that their First Amendment rights would be impaired as fully if they were paid to forswear billboard advertisement as they assertedly are under the San Diego ordinance. So, the federal preference for compensated billboard removal, see H.R.Rep.No. 95-1485, 95th Cong., 2d Sess. 15 (1978), does not advance appellants' cause here. Third, Congress in 1965 clearly recognized the same safety and aesthetic problems, inherent in each billboard site, which animated San Diego to action in 1972.

2. San Diego's second purpose in banning billboards was "to preserve and improve the appearance of the City as a place in which to live and work." San Diego Mun. code § 101.0700, at A (reprinted, J.S. App. 106a).

The California Supreme Court found this governmental purpose to be furthered by a billboard prohibition in both noncommercial and commercial areas in San Diego, J.S.App. 13a-14a.

In its planning study, the City of San Diego was motivated in part by the incongruity of spending city funds to install utilities underground (to enhance the aesthetic quality of the city), while permitting billboards to remain.[30]

In this respect, recognizing the connection between aesthetic betterment and the preservation of both private and public improvements, San Diego was acting similary to other cities.

Naperville, Illinois regulated billboards in part "[t]o preserve the value of private property by assuring the compatibility of street graphics with surrounding land uses."[31] Cities have assessed their unique aesthetic needs, as South Lake Tahoe, California, did in finding after public hearings:

> "The city is situated in a scenic mountain-forest-lake with a reputation as a restful resort community whose economic well-being is primarily dependent upon the attraction of tourists from all parts of the world. Recognizing that the city is one of the country's

[30]R. (Clerk's Tr.) 705.

[31]Ord. No. 74-23, amending Municipal Code § 10.1301 et seq.

foremost resorts, it is found that the proper control of signs is of particular importance."[32]

Akron, Ohio, found that "experience has demonstrated that billboards are frequently permitted to deteriorate and remain in a state of disrepair resulting in a blighting effect...," which was seen to conflict with the City's downtown rehabilitation program.[33]

3. It is not necessary to suggest that the City Council of San Diego knew of these ordinances to assert the obvious: by 1972 regulation of billboards for both safety and aesthetic purposes was a national imperative of government at all levels.

B. The California Supreme Court Fully Considered the Billboard Proprietors' Countervailing Interest, and Properly Found It Inferior to the City's Expressed Purposes.

Appellants' asserted First Amendment interests neither discredit nor outweigh the strong governmental interest in a billboard ban.[34]

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[32]Ord.No. 521 (1978), amending Municipal Code § 25.1 et seq. Palm Springs, California, was similarly motivated. Ord. No. 776 (1967), adding Ordinance Code § 8100 et seq.

[33]Ord. No. 426-1979, adding Planning and Zoning Code §1276.54.

[34]The provisions of San Diego's ordinance respecting the removal of existing billboards are not before the Court in No. 80-195. The ordinance was challenged on its face, and appellants make no assertion that the amortization schedule itself is facially irrational.

In any event, the provisions allowing billboard proprietors a period to amortize their commercial investment are reasonable.

Appellants suggest[35] that the California Supreme Court, beguiled by this Court's summary disposition in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 439 U.S. 808 (1978), gave less than adequate review to the tension between San Diego's interests and those of the billboard proprietors and their customers.

Appellants are misguided, and the First Amendment issue is here on review, not as an original proposition. The balance of interests in this case has been judicially approved once already, and adversely to appellants.

It is noteworthy that one of the subjects about which appellants assert that billboard advertising is constitutionally required, "to denounce the United Nations", J.S.5, was the subject of a similar balancing by the Supreme Court of California, affirmed last Term in *PruneYard Shopping Center* v. *Robins,* 447 U.S. ____, 100 S.Ct. 2035 (1980). There, the California Court held that a shopping center owner's interest was subordinate to the speech interest of students protesting a United Nations resolution.[36].

Here, the California Court held that the billboard companies' vicarious assertion of that U.N.-comment interest was inferior to San Diego's interest in traffic safety and environmental enhancement.

Certainly, the two cases taken together substantially discredit appellants' assertion here that the California Court was insensitive to the message appellants' customers pay to broadcast.[37]

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[35]Br. 33.

[36]This Court summarized the facts at 100 S.Ct. 2038.

[37]Rather, *PruneYard* merely confirms what a reasoned appraisal of reality suggests for this case: that billboards are principally a medium for the more commercial appeals, alternatives, many free or using volunteers, being chosen by less well-heeled advocacy groups.

The two cases show that Court's careful appraisal of the competing interests, as they arise from the facts of the cases. The City's ordinance strikes a similar balance.

For example, appellants assert that the message broadcast from billboards changes frequently (according to payment received by the appellants),[38] and offer the following examples, among others: " 'a particular sign may advertise . . . a candidate for mayor the next month . . . a new car the fourth month, and a union grievance the fifth month.' " J.S.5.[39]

Under the congeries of prohibitions and exceptions in San Diego's ordinance, J.S.App. 112a, the mayoral candidacy may be advertised temporarily, but the car and the grievance must be advertised in some fashion other than off-premises signs.[40]

It is our submission that, given the governmental interest served by a billboard ban, and the rational (even

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[38]Nothing in the record suggests that appellants make their medium available to causes, however worthy, on any other than a fee-paid basis.

[39]See also Brief of Appellants, at 25.

[40]Appellants' long recitation of the protection afforded less hazardous and less permanent media, Br. 21-27, confirms that purveyors of noncommercial messages will be able to communicate, without billboards, unhindered by the City of San Diego.

In any event, the record here does not support an argument that the candicate, the car seller, and the union grievants did not, or could not, use advertising media other than billboards. Common sense and experience suggests quite the opposite. Thus, this case is distinguishable from *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93 (1977), relied on by appellants, Br. 26.

super-rational) relationship between that end and the means chosen here, the balance struck by San Diego's City Council is a constitutionally permissible one. *Lotze* v. *Washington*, 444 U.S. 921 (1979).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

John Dekker, Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

James B. Brennan, City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

Henry W. Underhill, Jr.,
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

William R. Quinlan, Corporation
Counsel
511 City Hall
Chicago, Illinois 60602

Roy D. Bates, City Attorney
P.O. Box 147
Columbia, South Carolina 29217

Aaron A. Wilson, City Attorney
28th Floor – City Hall
Kansas City, Missouri 64106

J. LaMar Shelley, City Attorney
48 North Macdonald Street
Mesa, Arizona 85201

Benjamin L. Brown, City Solicitor
101 City Hall
100 N. Holiday Street
Baltimore, Maryland 21202

George F. Knox, Jr., City Attorney
174 E. Flagler Street
Miami, Florida 33131

Max P. Zall, City Attorney
City & County Building
Denver, Colorado 80202

Allen G. Schwartz
Cororation Counsel
100 Church Street, Room 6A-11
New York, New York 10007

Lee E. Holt, City Attorney
Dallas City Hall, 1500 Marilla
Room 7BN
Dallas, Texas 75201

Burt Pines, City Attorney
1800 City Hall East
Los Angeles, California 90012

Walter M. Powell, Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

Roger F. Cutler, City Attorney
101 City & County Building
Salt Lake City, Utah 84111

Jeffrey S. Goddess, City Solicitor
City-County Building, 9th Floor
800 French Street
Wilmington, Delaware 19801

Conard B. Mattox, Jr.
City Attorney
300 City Hall
Richmond, Virginia 23219

Charles S. Rhyne
William S. Rhyne
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420
Counsel of Record

Attorneys for Amicus Curiae
National Institute of Municipal
Law Officers

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